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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1192

PAUL TACKETT, District Judge of the First Judicial District Sitting by Designation, *Petitioner,*

v.

STATE OF NEW MEXICO, *Respondent.*

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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Respondent herein prays that the Petition for a Writ of Certiorari to the Supreme Court of the State of New Mexico from an order entered by it on November 3, 1967, be denied.

QUESTIONS PRESENTED

(1) Whether a defendant in a State Court in New Mexico against whom an indictment has been returned is entitled, prior to trial, to require the disclosure of information, namely police reports, statements of witnesses and grand jury testimony which form the basis of the indictment against him.

(2) Whether the refusal to supply this information denies the defendant due process of law under the Fourteenth Amendment and the effective assistance of counsel under the Sixth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Article VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

Article XIV, Section 1, Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The following Constitutional provisions of the State of New Mexico are not referred to by Petitioner, and Respondent believes them to be pertinent.

Constitution of the State of New Mexico

Article II, Section 14:

"*No person shall be held to answer* for a capital, felonious or infamous crime *unless on* a presentment *or indictment* of a grand jury or information filed by a district attorney general or their deputies, except in cases arising in the militia when in actual service in time of war or public danger. No person shall be so held on information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination.

A grand jury shall be composed of such number, not less than twelve, as may be prescribed by law. Citizens only, residing in the county for which a grand jury may be convened and qualified as prescribed by law, may serve on a grand jury.

Concurrence necessary for the finding of an indictment by a grand jury shall be prescribed by law; provided, such concurrence shall never be by less than a majority of those who compose a grand jury, and, provided, at least eight must concur in finding an indictment when a grand jury is composed of twelve in number. Until otherwise prescribed by law a grand jury shall be composed of twelve in number of which eight must concur in finding an indictment. A grand jury shall be convened upon order of a judge of a court empowered to try and determine cases of capital,

felonious or infamous crimes at such times as to him shall be deemed necessary, or a grand jury shall be ordered to convene by such judge upon the filing of a petition therefor signed by not less than seventy-five resident taxpayers of the county, or a grand jury may be convened in any additional manner as may be prescribed by law.

In all criminal prosecutions, the accused shall have the right to appear and defend himself in person, and by counsel; to demand the nature and cause of the accusation; to be confronted with the witnesses against him; to have the charge and testimony interpreted to him in a language that he understands; to have compulsory process to compel the attendance of necessary witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. (As amended November 4, 1924, effective January 1, 1925.)." (Emphasis added).

Statutes of the State of New Mexico

Sections 41-5-17, 41-5-24, 41-5-30, 41-6-8, and 41-6-47, N.M.S.A., 1953 Compilation, as amended, are as follows:

"41-5-17. Inquiry into public offenses—Indictments.—The grand jury have power, and it is their duty to inquire into all public offenses committed or triable in the county, and to present them to the court, by indictment."

"41-5-24. Advice of court and court officers—Officials barred from attendance at final deliberations.—The grand jury may, at all reasonable times, ask the advice of the court, the attorney general or the district attorney of the county, and whenever required by the grand jury, it shall be the duty of the district attorney of the county to attend them for the purpose of framing indictments, or of examining witnesses in their presence,

but no district attorney, sheriff or other person shall be permitted to be present during the expression of opinions, or giving of their votes upon any matters before them." (Emphasis added).

"41-5-30. Disclosure of testimony of witness in trial for perjury.—A grand juror may, however, be required by the court, to disclose the testimony of any witnesses examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given before them, by any other person, upon a charge against him for perjury, or in giving his testimony, or upon his trial thereof."

"41-6-8. Bills of particulars.—(1) When an indictment or information charges an offense in accordance with the provision of section 42-607 (41-6-7), but fails to inform the defendant of the particulars of the offense sufficiently to enable him to prepare his defense, or to give him such information as he is entitled to under the Constitution of this state, the court may, of its own motion, and shall, at the request of the defendant, order the district attorney to furnish a bill of particulars containing such information as may be necessary for these purposes; or the district attorney may of his own motion furnish such bill of particulars.

(2) When the court deems it to be in the interest of justice that facts not set out in the indictment or information or in any previous bill of particulars should be furnished to the defendant, it may order the district attorney to furnish a bill of particulars containing such facts. In determining whether such facts and, if so, what facts, should be so furnished, the court shall consider the whole record and the entire course of the proceedings against the defendant.

(3) Supplemental bills of particulars or a new bill may be ordered by the court or furnished voluntarily under the conditions above stated.

(4) Each supplemental bill shall operate to amend any and all previous bills and a new bill shall supersede any previous bill.

(5) When any bill of particulars is furnished it shall be filed of record and a copy of such bill given to the defendant upon his request."

"41-6-47. Names of witnesses to be endorsed on indictment or information.—When an *indictment* or information is filed, *the names of all the witnesses* or deponents on whose evidence the indictment or information was based *shall be endorsed thereon* before it is presented, and the district attorney shall endorse on the indictment or information at such time as the court may by rule or otherwise prescribe the names of such other witnesses as he purposes to call. A failure to so endorse the said names shall not affect the validity or insufficiency of the indictment or information, but the court in which the indictment or information was filed, shall, upon application of the defendant, direct the names of such witnesses to be endorsed. No continuance shall be allowed because of the failure to endorse any of the said names unless such application was made at the earliest opportunity and then only if a continuance is necessary in the interest of justice." (Emphasis added.)

STATEMENT

Respondent does not object to Petitioner's Statement of the Case, but believes the following matters are pertinent for adequate consideration by the Court.

Respondent points out that the grand jury minutes requested by Petitioner were not transcribed and that Respondent did not intend to have them transcribed for its use. (R. 40, 43—Finding IV) Respondent points out that Petitioners, except for one, were not indigent but that the demand, for copies of the minutes, called for Respondent to pay the expense thereof.

(R. 40, 43—Finding III) Respondent points out that the Respondent did not have in its possession or under its control, the police reports and statements requested. (R. 40, 43—Finding IV) Respondent points out that the names of the witnesses were endorsed on the indictment and no claim is made that they were unavailable to Petitioner. All of the above is set forth in the motions of Petitioner in the New Mexico State District Court and in the Alternative Writ of Prohibition granted by the New Mexico Supreme Court.

ARGUMENT

Respondent does not believe that a substantial Federal question is presented. Petitioner contends that the statutes of New Mexico as set forth above are not relevant. Respondent respectfully submits that they are relevant and in point and show that Petitioners had adequate protection of their rights under the Sixth and Fourteenth Amendments to the United States Constitution. Respondent believes that this is so clear that further argument and briefs are unnecessary and that the correctness of the decision of the Supreme Court of the State of New Mexico is clear. *State* v. *Tackett*, —— N.M. ——, 432 P. 2d 415.

First, Respondent respectfully disagrees with Petitioner's statement that the law in New Mexico is not clear. The case of *State* v. *Morgan* (1960), 67 N.M. 287, 354 P. 2d 1002, points out the right of a defendant to examine the testimony of witnesses before a grand jury in order to impeach him during the trial. The Court there reviewed the basis for secrecy of grand jury proceedings and concluded that the privilege of the witness vanished when he testified and that his testimony could then be examined for purposes of impeachment. No such basis is presented in Petitioner's

request here to be allowed to go on a "fishing expedition."

Secondly, any details sought by Petitioner can be obtained by means of bills of particulars. (Section 41-6-8, N.M.S.A., 1953 Compilation) There is no showing that sufficient particulars cannot be so obtained so as to fully inform Petitioners of any matters pertinent to their defense.

Thirdly, the Petitioners do not show that they were unable to gain access to the witnesses whose names are entered on the indictments. (Section 41-6-47, N.M.S.A., 1953 Compilation) In substance Petitioners seek to have the State do their work for them.

Fourthly, there is no claim or showing that there is any supression of evidence that would materially aid the cases of Petitioners.

Fifthly, the Court specifically found that the statements and reports sought by Petitioners were not in the possession or control of Respondent and this is not attacked. (R. 40, 43)

Sixthly, it appears that the grand jury testimony sought is not transcribed and there is no intention on the part of Respondent to have it transcribed. (R. 40, 43)

Finally, by law, the Respondent was specifically excluded from the deliberations of the grand jury from which the indictment issued and there is no showing that Respondent knows what testimony or portions thereof were relied upon by the grand jury in returning the indictment. (Section 41-5-24, N.M.S.A., 1953 Compilation.)

Respondent's knowledge is limited to the names of witnesses endorsed on the indictment by the grand jury,

and its investigation of their evidence, which is equally available to the Petitioners.

CONCLUSION

Petitioner's questions have been presented. It is clear that there is no denial of any right to Petitioners under either the Sixth Amendment or the Fourteenth Amendment to the Constitution of the United States. There is ample protection for the Petitioners and their representation by counsel is adequately protected. The witnesses are available to Petitioners and the testimony of such witness before the grand jury, if he testifies at the trial, is available for impeachment purposes. The other evidence sought, if any, was not in Respondent's possession or control, or can be obtained by bills of particulars. There is no adequate basis presented for violating the need for grand jury secrecy in the manner attempted by Petitioners.

Respondent respectfully contends that the answers to the questions are clear and that any further consideration would be unnecessary. Respondent respectfully contends that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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